82-817

No.: _____

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IN THE

Supreme Court of the United States

October Term, 1982

ALBERT EUGENE CARMICHAEL, JR.,
and JOE GRADY FLOWERS,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: November 15, 1982

Question Presented

Whether 42 U.S.C. § 1973i(c), barring payments for votes in elections held solely or in part for the purpose of electing federal officers, applies to payments made for votes in a local sheriff's race, absent proof of an intended or actual impact on any federal election contest and absent proof that any of the paid voters cast a vote for a federal candidate?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Albert Eugene Carmichael, Jr., and Joe Grady Flowers respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

Opinion Below

The Opinion of the Fourth Circuit (Appendix A, *infra*, pp. 1a - 17a) has not yet been officially reported.

Jurisdiction

The judgment of the Fourth Circuit was entered on August 12, 1982. A timely petition for rehearing was denied on September 16, 1982 (App. B, *infra*, p. 18a), and this petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 42:

§ 1973i. Prohibited acts

* * * *

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

Statement of the Case

Albert Eugene Carmichael, Jr., a former member of the South Carolina State Senate, and Joe Grady Flowers, the former Mayor of Lakeville, South Carolina, were indicted in February, 1981, on federal charges relating to an alleged scheme to pay voters to cast their ballots for a particular candidate in a local sheriff's election. The thrust of the indictment was that Carmichael, Flowers, and others had attempted to gain for one Roy Lee the Democratic Party nomination for sheriff of Dillon County, South Carolina. By making payments to voters to cast absentee ballots for Lee, the indictment alleged, the defendants attempted to ensure his victory in a primary election that was held in Dillon County on June 10, 1981.

There was no allegation that the defendants had intended to "buy" votes or had engaged in any conduct on behalf of anyone other than candidate Lee. Nevertheless, the indictment charged Carmichael and Flowers with conspiring to violate and with substantive violations of 42 U.S.C. § 1973i(c), a federal statute that proscribes payments to voters in elections that are held solely or in part to select or elect candidates for federal offices such as President, Senator, or Representative. In this case, the primary election in which Lee was running for the sheriff nomination was also being held to nominate candidates for federal office. Based solely on this fact, the Government chose to proceed under 42 U.S.C. § 1973i(c) despite the defendants' lack of intent to affect any federal contest.

The proof at trial detailed a plan to secure Lee's nomination for sheriff by paying voters an average of $5 to obtain and complete absentee ballots naming Lee as their choice. In support of the substantive counts of the indictment, a number of individual voters testified about the payments they received for their absentee ballots. There was no proof that *any* of the voters who received money cast a vote for any candidate for federal office; each voter testified only about the vote he or she had

cast for Roy Lee. None of the witnesses testified that they were solicited to vote or did vote for any candidate other than Lee. Indeed, to the extent that there was any evidence on this score, it was that no such vote had been cast.[1]

Citing the Government's failure to prove that any of the "paid" voters had voted for a federal candidate, the defendants moved for dismissal of the charges. The trial judge ruled, however, that the mere presence of federal candidates on the ballot was sufficient to establish federal criminal jurisdiction and to bring the defendants' activities within 42 U.S.C. § 1973i(c). Accordingly, the jury was instructed that the payments need not have generated any votes for a federal candidate. To convict, the jury need have found only that payments were made to voters and that federal candidates were on the ballot.

Following its receipt of these instructions, the jury convicted Carmichael and Flowers on all counts. Carmichael was sentenced to five years' imprisonment on the vote-buying charges and to a consecutive five-year term on a related charge of obstruction of justice. Flowers received a four-year prison term on the vote-buying charges and a consecutive three-year term for obstruction.

Both defendants appealed their convictions to the Fourth Circuit. They contended on appeal that the mere presence of federal candidates on the ballot could not support their conviction under 42 U.S.C. § 1973i(c) for conduct that impacted solely on a local election, and that some impact on or threat to the integrity of a federal race had to be alleged and proved.

The Court of Appeals rendered a published opinion affirming the convictions on August 12, 1982. The Court

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[1]For instance, when asked about the absentee ballot that was cast by Dixie Johnson, one witness stated that Johnson's only vote had been for Roy Lee.

apparently agreed that the mere presence of federal candidates on the ballot did not support federal prosecution; it ruled that the evidence had to show, at a minimum, that the defendants' vote-buying activity had exposed the federal contests to the "possibility of corruption." (App. A, *infra*, p. 9a). The Court, however, went on to examine the evidence adduced at trial and to conclude that a "possibility of corruption" did exist in this case. The panel ignored the fact that this issue had not been tried to the jury, and moreover found the "possibility of corruption" in the total absence of evidence that any "paid" voter had voted for a federal candidate.

Reasons for Granting the Writ

The net effect of the decision of the Court of Appeals is to affirm federal convictions for voting fraud based on conduct that was intended to affect and did affect only a local sheriff's election. This result flies in the face of a number of decisions of this Court holding that such conduct is beyond the sphere of Congressional regulation, and raises an issue identical to the one this Court decided to consider and then did not reach in *Anderson v. United States*, 417 U.S. 211 (1974). Moreover, the Fourth Circuit's attempt to find a federal "nexus" for the crimes charged directly conflicts with this Court's prior holding that federal jurisdiction in a case such as this one requires, at a minimum, some proof that a vote or votes were cast for a federal candidate. *Blitz v. United States*, 153 U.S. 308, 314-15 (1894). Accordingly, the writ of certiorari should issue so that the Fourth Circuit's erroneous reading of 42 U.S.C. § 1973i(c) may be corrected and that important statute freed of any constitutional infirmity.

I

The Decision Below Conflicts with the Decisions of This Court Confining Federal Jurisdiction to Conduct Having an Actual or Potential Impact on Federal Elections.

In a line of decisions extending back for over 100 years, this Court has made it clear that Congress does not have unlimited Constitutional authority to regulate the conduct of local elections. As early as *United States v. Reese*, 92 U.S. 214 (1875), the Court decided that, except insofar as necessary to enforce the guarantees against racial discrimination contained in the Fifteenth Amendment, Congress must leave the policing of state and local elections to state and local authorities. To be sure, Congress has the power to regulate elections for federal officials, and it retains that power where an election concerns both local and federal offices. Even in such "mixed" elections, however, the Court has made it clear that acts touching only upon local contests may not be the subject of Congressional intervention. *Ex parte Siebold*, 100 U.S. 371, 393 (1879) ("If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction . . . ."). *See also, e.g., Blitz v. United States, supra*, 153 U.S. at 314-15 ("Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress. With frauds of that character the national government has no concern . . . ."); *Oregon v. Mitchell*, 400 U.S. 112, 129-30 (1970).

II

The Decision Below Raises an Important Issue of Federal Law Which Has Not Been and Should be Resolved by This Court.

In light of these and other precedents, it is apparent that any attempt to apply a federal criminal statute to the regulation of purely local election irregularities must raise serious statutory and constitutional questions. Indeed, this Court granted certiorari in *Anderson v. United States*, 417 U.S. 211 (1974), to consider the propriety of the Fourth Circuit's application of 18 U.S.C. § 241 to a conspiracy to cast false votes in a state or local election. After reviewing the record, the Court concluded that the conspiracy embraced fraudulent voting in federal races as well, and therefore decided not to reach the question upon which certiorari had been granted. 417 U.S. at 222-28. The Court's initial decision to hear the case, however, reflects the serious questions raised by the decision to apply a federal criminal statute to local election fraud. As Justice Douglas noted in dissent in *Anderson*, such a decision "reaches to the very heart of federal-state relations." 417 U.S. at 244.[2]

This case raises issues virtually identical to those upon which the Court granted certiorari in *Anderson*. The legislative history of 42 U.S.C. § 1973i(c), like that of 18 U.S.C. § 241 (*see Anderson*, 417 U.S. at 237-43), clearly shows that Congress was aware of the constitutional problems inherent in its regulation of local elections, and sought to restrict the application of the statute to cases involving an impact on federal races. The precursor of § 1973i(c) was not included in the original Senate version of the Voting Rights Act of 1965, but was proposed by Senator Williams during the debate

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[2]Justice Douglas, joined by Justice Brennan, concluded in *Anderson* that the conspiracy had not included federal vote fraud, and that 18 U.S.C. § 241 did not reach conspiracies to interfere with local and state elections. 417 U.S. at 228-45. Accordingly, he would have reversed the convictions in that case.

on the Senate floor. 111 Cong. Rec. 7890, 8433 (1965). Senator William's proposal, however, applied by its terms to all elections in all states, prompting various senators to question its constitutionality. 111 Cong. Rec. 8431-33. Senator Hart, for instance, noted that the question "whether Congress has the power to insure fair election procedures in State and local elections, unless they are related to insuring the guarantees under the 14th and 15th Amendments, is a very open one and a very serious one." 111 Cong. Rec. 8433 (1965).

In order to allay such fears, Senator Ervin proposed a jurisdictional amendment limiting the scope of the prohibition in what became § 1973i(c) to elections for federal officers, including presidential electors, Senators and Representatives.[3] Senator Williams concurred in the Ervin amendment, 111 Cong. Rec. 8975 (1965), and, after some technical alterations, it was enacted into law as the proviso that now appears in § 1973i(c), which restricts the statute's application to "general, special, or primary elections held solely or in part" to elect federal officers.

Despite the clear intention of the proviso, the Fourth Circuit in this case affirmed the application of the statute to conduct that had an intended and demonstrated effect only upon a local sheriff's race. The question thus presented mirrors the one upon which the Court granted certiorari in *Anderson:* In light of prior

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[3]Senator Ervin explained:

> "In my opinion Senator Williams' version of Section 1973i(c) in its present form is unconstitutional because it is not restricted to Federal elections. By the term 'federal elections,' I mean elections in which presidential electors and Members of the U.S. Senate and Members of the U.S. House of Representatives are chosen. The only effect of my amendment would be to confine the application of the amendment . . . to federal elections and thereby make it constitutional under the interpretations placed on the 15th amendment by the Supreme Court of the United States in a number of cases." 111 Cong. Rec. 8975 (1965).

precedents limiting Congressional power to regulate local elections, and legislative history suggesting that Congress intended to respect those precedents in the statute at issue, should the Fourth Circuit have applied a federal criminal law to punish activity that had no intended or actual impact on a federal election contest? *Anderson* itself establishes that this question warrants Supreme Court review.

III

The Fourth Circuit's Attempt to Find a Basis for the Exercise of Federal Criminal Jurisdiction in This Case in Itself Conflicts with Prior Decisions of This Court.

The *Anderson* Court ultimately did not have to decide the issue upon which certiorari had been granted because the evidence in that case showed that the defendants intended that false votes be cast for an entire slate of candidates, including not only the local candidate whose election the defendants were attempting to secure but candidates for federal office as well. 417 U.S. at 222-28. The same is not true here. In this case, there was absolutely no evidence that the defendants "knowingly participated in a conspiracy which contemplated the casting of . . . votes for all offices at issue in the election." *Anderson, supra,* 417 U.S. at 225. With respect to the substantive counts, there was no evidence that any of the named voters who received payments cast a vote for a federal candidate.[4]

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[4]The Court of Appeals did refer passingly to facts proved at trial which it claimed raised a "possibility of corruption" as to the federal elections. It cited the return of unsealed ballots to Flowers and the large number of absentee votes cast for incumbent John Jenrette in the House of Representatives primary contest. (App. A, *infra*, p. 9a.) There was no proof, however, that the conspiracy between Carmichael and Flowers contemplated that ballots would be returned unsealed or that absentee ballots would be cast on Jenrette's behalf. Moreover, the substantive counts rested on allegations of payments made to individual, named voters. The fact that other voters may have cast ballots for offices other than sheriff does not make up for the Government's failure to prove that the particular voters alleged to have been paid did so.

To be sure, the Fourth Circuit in this case attempted to justify the application of 42 U.S.C. § 1973i(c) to the defendants' activities in the sheriff's race by finding that their conduct exposed the federal elections as well to the unintended "possibility of corruption." (App. A, *infra*, p. 9a). This attempted justification, however, was improper on several grounds which of themselves warrant review by this Court.

In the first place, where the crime is the illegal payment of money to a voter, there can be no "possibility of corruption" of a federal race absent allegation and proof that the paid voter actually cast a ballot for a federal candidate. This is the plain thrust of this Court's decision in *Blitz v. United States, supra.* In *Blitz,* the defendant was charged with having voted for a Representative in Congress under someone else's name. The defendant had cast the vote at a "mixed" election for federal and local offices, and the proof plainly showed that he had cast more than one ballot. As to one count in the indictment, however, the Government did not allege that the defendant actually had cast his false vote for the federal candidate; it simply alleged that he had voted under another name in an election in which a congressional representative would be chosen. This Court dismissed the count, reasoning as follows:

> "Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress. With frauds of that character the national government has no concern, and, therefore, an indictment .... for knowingly personating and voting under the name of another, should clearly show that the accused actually voted for a Representative in Congress, and not simply that in voting he falsely personated another at a general election at which such Representative was or could have been chosen. In cases like the present one, it should not be left in doubt, or to mere inference, from the words of the indictment, whether the offence

charged was one within Federal cognizance." 153 U.S. at 314-15.

This holding should have been, but was not, applied by the Fourth Circuit to this case. Carmichael and Flowers were convicted of substantive violations of 42 U.S.C. § 1973i(c) based on payments made to specific voters who testified as trial witnesses. But there was no testimony from any of those witnesses that they had cast a vote for a federal candidate. Indeed, as we have noted, there was affirmative testimony that, at least in some instances, the only vote they had cast was on behalf of Roy Lee for Sheriff of Dillon County. As in *Blitz*, the "mere inference" that some of the paid voters had voted for a federal candidate should not have been sufficient to establish federal jurisdiction and to sustain the defendants' convictions. The conflict between the Fourth Circuit's holding in this case and this Court's prior decision in *Blitz* alone warrants the grant of the writ.[5]

Even putting the conflict with *Blitz* to one side, the Fourth Circuit's holding based on the "possibility of corruption" of the federal election contests in this case was badly flawed and should be corrected on

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[5]The Court of Appeals distinguished Blitz in a footnote by pointing to this Court's decision in *In re Coy*, 127 U.S. 731 (1888). (App. A. *infra*, at 10a). *Coy*, however, involved a charge that the defendants had induced election officers to violate their duty by surrendering custody of voting records to third parties before their return and tally. The Court held that this conduct had exposed the federal ballot results, as well as the state and local results, to potential alteration, and therefore upheld the exercise of federal jurisdiction. The Fourth Circuit, noting some evidence in the record that some of the ballots in this case had been delivered to Flowers unsealed, held that *Coy* and not *Blitz* should apply. Neither Flowers nor Carmichael, however, were charged with ballot tampering or with any activity relating to the handling of the ballots. Any possibility of corruption of the federal elections flowing from this activity, therefore, could not properly have been a basis for affirming their convictions The *Blitz* Court itself distinguished *Coy* on this basis, and the same distinction applies here. Paying someone to vote for a state candidate cannot possibly affect the integrity of a federal election.

certiorari. The Court of Appeals took the apparent view that criminal jurisdiction in election fraud cases depends on the evidence adduced at the trial. Thus, the Court held that a charge under 42 U.S.C. § 1973i(c) could be sustained "*when the evidence shows* . . . that [the defendant's conduct] exposes the federal aspects of the election to the possibility of corruption . . . ." (App. A, *infra*, at p. 9a, *quoting United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982), *quoting United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981)(emphasis added)). The panel then reviewed the evidence at the Carmichael/Flowers trial and concluded that the defendants' conduct had exposed the federal election contests to potential, if not actual, corruption. (App. A, *infra*, at pp. 9a—10a).

By deciding the case in this manner, the court below, in addition to everything else, affirmed the defendants' convictions on the basis of dubious factual findings that were never made by or even submitted to the jury. The factual question whether the defendants' conduct in this case exposed any federal race to potential corruption was removed from the case when the trial judge refused to charge the jury that actual, intended, or threatened impact on a federal election contest was an element of the offense. Instead, the judge, over the defendants' vigorous objections, charged the jury that the mere presence of the federal candidates on the ballot was of itself sufficient to convict if payments had been made to any voters. With the case in this posture, it was improper for the Court of Appeals to have affirmed the defendants' convictions based on its own appellate fact-finding. As this Court held in *Chiarella v. United States*, 445 U.S. 222 (1980), a criminal conviction may not be affirmed "on the basis of a theory not presented to the jury . . . ." 445 U.S. at 236, citing *Rewis v. United States*, 442 U.S. 100, 106 (1979). Likewise here, the question whether the defendants' conduct had potentially corrupted a federal race should have been presented to the jury for decision, especially since the defendants contended throughout that their actions could not possibly

have affected the federal contests that occurred together with the local sheriff's election.

In short, this case involves defendants who were convicted of conspiring to violate 42 U.S.C. § 1973i(c) absent any proof that their conspiracy contemplated the casting of so much as a single "paid" vote on behalf of any federal candidate. They were convicted of substantive violations of 42 U.S.C. § 1973i(c) based on payments to individuals who, so far as the trial proof showed, cast votes only in a local sheriff's race. For the reasons stated, these convictions raise substantial questions of federal-state relations that should be reviewed by this Court on certiorari.

Conclusion

A writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Dated: November 15, 1982

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5141(L)

UNITED STATES OF AMERICA,
Appellee,

v.

ALBERT EUGENE CARMICHAEL,
Appellant.

No. 81-5142

UNITED STATES OF AMERICA,
Appellee,

v.

JOE GRADY FLOWERS,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Charles E. Simons, Jr., District Judge

Argued: May 6, 1982 Decided: August 12, 1982

Before PHILLIPS and ERVIN, *Circuit Judges,* and DOUMAR,* *District Judge.*

Ronald P. Fischetti; Morris D. Rosen (Rosen, Oberman & Rosen on brief); John C. Lindsay; (Henry Hammer on brief) for Appellants; Craig C. Donsanto, Director,

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*The Honorable Robert G. Doumar, United States District Judge for the Eastern District of Virginia, sitting by designation.

Election Crimes Branch; Thomas P. Simpson, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney, David J. Slattery, Special Assistant United States Attorney; Nancy Simmons Stewart, Public Integrity Section, Criminal Division, Dept. of Justice on brief) for Appellee.

ERVIN, *Circuit Judge:*

In this appeal, Albert Eugene Carmichael, Jr. and Joe Grady Flowers challenge their convictions stemming from an extensive vote-buying investigation of the 1980 democratic primary election in Dillon County, South Carolina.[1] The defendants were tried together and both were convicted of conspiracy to buy votes and substantive counts of vote buying in the primary election, as well as obstruction of justice in connection with the grand jury investigation of the election. Carmichael challenges the sufficiency of the evidence supporting his convictions, while Flowers joins him in vigorously pressing other grounds for reversing the convictions, including lack of federal jurisdiction to prosecute, prejudicial joinder of the obstruction charges, improper selection of the grand jury, and erroneous admission of certain evidence. Upon consideration of each of these arguments and assiduous scrutiny of the record below, we find no error and, therefore, affirm the convictions.

I.

On February 2, 1981, Albert Eugene Carmichael, a South Carolina state senator at that time,[2] and Joe Grady Flowers, Mr. Carmichael's parttime employee,

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[1]The appeals were consolidated by order of this court pursuant to local rule 9.

[2]Mr. Carmichael resigned from the state senate on March 12, 1980, almost ten months after he was adjudged guilty and sentenced by the district court.

were indicted for conspiracy, obstruction of justice and buying absentee ballots in connection with the June 10, 1980, democratic primary election in Dillon County, South Carolina. Among the offices contested in the election were the Sheriff of Dillon County, United States Senate and United States House of Representatives. In count one of the indictment.[3] Mr. Carmichael and Mr. Flowers were charged with conspiracy to pay voters to vote for encumbent Sheriff Roy Lee in violation of 18 U.S.C. § 371. Counts two through thirteen charged the appellants with knowingly and willfully paying and offering to pay and willfully aiding and abetting others to pay twelve voters in violation of 42 U.S.C. § 1973i(c)[4] and U.S.C. § 2.[5] Count fourteen charged Mr. Flowers

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[3]Mazel J. Arnette originally was indicted with Mr. Carmichael and Mr. Flowers. She entered a plea of guilty the day before trial and testified as a witness for the government.

[4]Section 1973i(c) provides as follows:

> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, that this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

42 U.S.C. § 1973i(c) (1981).

[5]Section 2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1969).

with obstruction of justice for urging a subpoenaed witness to give false testimony before the grand jury. Count sixteen charged Mr. Carmichael with obstruction of justice based on similar allegations.

On March 31, 1981, the defendants filed a motion for dismissal of the indictment because of improper selection of the grand jury. That motion was denied by an order of the court dated May 14, 1981. Various other pretrial motions including a defense motion for separate trials were heard and disposed of on March 4, 1981, and the parties went to trial on April 13, 1981.

Mr. Carmichael has been active in Dillon County politics for twenty-five years. In 1978, he was elected to fill an unexpired term in the state senate to represent a district that included Dillon, Marlboro, Chesterfield, and Lee Counties. He ran for re-election in the 1980 democratic primary and general election and was elected to a four-year term. During the 1980 elections he also served as a state democratic executive committeeman from Lakeview precinct.

Mr. Flowers was for many years the postmaster in Lakeview and was barred from engaging in any political activity by the Hatch Act. In early 1979 he retired from the post office and began parttime work as a secretary for his close friend, Carmichael. Flowers was paid $50.00 a week as expense money for work in Carmichael's Lakeview office. In mid-April 1980, Sheriff Roy Lee[6] asked Flowers to work for him in his re-election campaign. Lee gave Flowers $500.00 cash to pay "haulers" who were to help people register, obtain absentee applications or get to the polls. Carmichael gave Flowers permission to work for Lee and gave Flowers $500.00 to help in Lee's campaign. Flowers added

[6]Roy Lee pleaded guilty to charges of conspiracy to buy votes in connection with his re-election in the 1980 democratic primary.

another $200.00 to $300.00. No records were kept to account for this money.

To vote absentee in a primary election in South Carolina, a voter applies by mail or in person to the County Executive committee at a location the Committee designates as the absentee voting place or precinct. When the County Executive Committee receives a completed application it checks with the Board of Voter Registration to determine whether the applicant is registered in that county and, if so, mails the applicant an absentee ballot along with instructions, an oath envelope and a return envelope. The applicant is instructed to vote the ballots, put them in the oath envelope, sign the oath which states that he is qualified to vote in the election and has not voted any other ballots, seal the oath envelope, put it in the preaddressed envelope to the county absentee precinct, and mail it.

On April 14 1980, the chairman of the Dillon County Democratic Party, Alan Schafer,[7] wrote Carmichael a letter placing him in charge of absentee ballot procedures in Lakeview. Schafer instructed Carmichael to make absentee applications available to voters from his office or other places that would be convenient. The applications were to be forwarded to Schafer, who would mail out ballots to all qualified applicants. That same day, Carmichael wrote Flowers delegating to Flowers his authority to distribute absentee ballot applications from Carmichael's office.

On April 21, April 28, and May 12, political meetings for Sheriff Roy Lee's re-election campaign were held at Carmichael's lakehouse. Among the fifty-five to seventy-five persons who attended the first supper

[7]Alan Schafer pleaded guilty to conspiracy and substantive counts of mail fraud for the illegal and fraudulent use of absentee ballots to re-elect Roy Lee as Sheriff.

meeting were Flowers, Carmichael, Lee and a number of Lee's workers and supporters. Government witnesses testified that at each of these meetings the discussion centered on getting blacks to vote by absentee ballot and the fact that the voters wanted money. Sammie Lee Catoe, a trustee at the Dillon County Jail who cooked the supper, testified that after most guests at the first meeting had gone, he heard Carmichael tell Sheriff Lee that if Lee would just take five dollars and add it to what Lee had paid during the last election, he could win. Catoe also testified that Carmichael told Lee that they needed about 1,700 absentee ballots to win.

At the second and third meetings, the discussion centered on procedures for soliciting absentee ballots and how much voters would have to be paid. Government witnesses who attended these meetings testified that as workers for Lee they would be paid $10.00 per absentee ballot turned in and that they could pay the voters whatever they wished, probably $5.00. Applications for absentee ballots were available at the meeting and it was suggested that the workers would tell the voters to use employment outside the county or vacation as the reason for applying for absentee ballots. Flowers attended all three of these meetings; Carmichael was present at only the first and third.

The vote-buying scheme was carried out as planned. Workers for Lee picked up absentee ballot applications from Flowers at Carmichael's office in Lakeview. They took these applications to voters, had them filled out, and turned them back in to Flowers. After the ballots were mailed to the voters, the workers usually returned to help the voter fill out the ballot and then turned the ballot in to Flowers. In some cases, the ballots were sealed when returned as required by the instructions; in many cases they were unsealed. Flowers paid the worker $10.00 per ballot and the worker paid the voter.

Several witnesses testified that during the campaign they communicated with Carmichael. Mazel Arnette testified that several times before the election, Carmichael told her it was all right to pay voters for their time and trouble and to give voters some money as long as she did not tell them she was buying a vote. Luther Nance[8] stated that he was recruited to buy votes and met Flowers at Carmichael's office to receive instructions about absentee ballots. Further, Nance stated that after the investigation began, he met with Carmichael at his office and the senator told him "if anybody came around, askind me (Nance) anything about giving anybody any money, tell them I didn't." Similarly, Mr. Freddie Wilson testified before the grand jury that Flowers had told him on two occasions to lie about giving money to voters. At trial, Wilson said he did not recall that testimony, but when it was read to him, he said he remembered and affirmed his prior testimony. Another witness testified that Carmichael told him that his expenses would be paid and "if you want to give somebody something, that's up to ya'll. I don't see anything wrong with that." Robert Miller, a lifelong Dillon County resident, testified that he was in the gas station in front of Carmichael's office on May 10, 1980, when Carmichael came in and asked Flowers how many absentee ballots had been collected that day. After Flowers said about fifty, Carmichael responded, "(t)hat's good."

The government also introduced tally sheets of county-wide absentee ballot totals, which showed that 1,265, or 94% of all absentee ballots cast in Dillon County, were cast for Sheriff Lee.[9] In Lakeview precinct,

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[8]Nance testified under a plea agreement by which he pleaded guilty to one count of vote buying in exchange for his testimony.

[9]Lee received a total of 3,905 votes. Mr. Rogers, Lee's opponent, received a total of 4,686 votes, with only 81 of these votes being absentee.

which is one of twenty-one precincts in the county, 400 persons voted absentee. Two out of every five votes cast in Lakeview precinct were by absentee ballot.

Carmichael and Flowers both testified in their own defense. Each categorically denied paying any voters for their votes, engaging in a conspiracy to buy votes, or telling anyone to give false testimony to the grand jury. Flowers admitted giving money to the campaign workers, but denied instructing them to return the absentee ballots to his office. He also admitted giving several voters a few dollars after they gave him their absentee ballots, but said that the money was a loan. Carmichael admitted that he had won his own race for the state senate in 1979 with 960 out of 970 absentee ballots cast in his district cast for him.

II

A.

Carmichael and Flowers were convicted under 42 U.S.C. § 1973i(c), which provides in pertinent part as follows:

> "Whoever knowingly or willfully. . .pays or offers to pay. . .for votes shall be fined no more than $10,000, or imprisoned not more than five (5) years, or both: Provided, however, that this provision shall be applicable only to general, special, or primary elections, held solely or in part for the purposes of selection or electing any candidate for the office of President, Vice-President, President Elector, Member of the United States Senate, Member of the United States House of Representatives. . ."

The defendants contend that Congress has power to control only federal elections and that 42 U.S.C. § 1973i(c) requires proof that any vote buying actually affected an election for federal office. The government argues that Congress is empowered by the Constitution and intended to prohibit any vote buying that occurs

during a mixed state/federal election because such criminal activity potentially corrupts all contests in the election. This issue was resolved by this court in *United States v. Mason*, No. 81-5025 (4th Cir., March 25, 1982)(unpublished), which is a case arising out of the same vote-buying scheme giving rise to the convictions at issue in this case.

In *Mason*, the defendant was one of Sheriff Lee's campaign workers who paid for absentee ballots. We held that it is not necessary for the government to prove that vote-buying activities actually affected a federal contest. Rather, a violation of § 1973i(c) is established when the evidence shows that a defendant bought or offered to buy a vote and that such activity

> exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption.

Id., Slip Op. at 6 (quoting *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981).

There was a possibility of corruption of the two federal contests in the Dillon County democratic primary because many of the envelopes containing the absentee ballots were unsealed when they were picked up from the voters and when they were turned in to Flowers. There was also testimony that Flowers and several workers helped voters mark their absentee ballots not only for the sheriff's race, but for others as well.[10] We hold, therefore, that the statute clearly

[10]Of the 1,346 absentee ballots cast in the sheriff's race, Lee received 1,265. Of the 1,308 absentee ballots cast in the race for United States House of Representatives, incumbent John Jenrette received 1,108. Clearly, some of the 400 absentee ballots received in Lakeview precinct were voted in the congressional election.

proscribes the conduct for which Flowers and Carmichael were prosecuted in this case. The power of Congress to proscribe conduct that potentially corrupts a federal contest in addition to conduct that actually corrupts a federal contest has been upheld previously. *See In re Coy*, 127 U.S. 731 (1888); *United States v. Malmay*, No. 81-3068 (5th Cir. March 31, 1982); *United States v. Mason, supra.*[11]

B.

Carmichael also challenges his conviction on the ground that the evidence was not sufficient to prove beyond a reasonable doubt that he conspired to buy votes and aided and abetted payments to twelve voters named in the indictment. We must decide, therefore, whether there is substantial evidence, when considered in the light most favorable to the government, that shows Carmichael is guilty beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Stroupe*, 538 F.2d 1063 (4th Cir. 1976). The existence of an illegal agreement need not be proved by direct evidence, but may be inferred from facts and circumstances that show that the defendant acted in

[11]Carmichael and Flowers argue that the Supreme Court required a showing of actual corruption of a federal election in *Blitz v. United States*, 153 U.S. 308 (1894). In *Blitz*, the Court held that a defendant who voted in the name of another person in a mixed federal/state election could not be prosecuted under federal law because the indictment did not allege that the defendant voted for a federal candidate. In *In re Coy*, 127 U.S. 731 (1888), however, the Court had held that the defendants who had induced election officers to take election records in a federal/state election to persons with no authority to receive them could be prosecuted under federal law. The *Blitz* court distinguished *Coy* on the ground that delivery of tally sheets to unauthorized persons raised the danger of corrupting the federal and state contests, whereas in *Blitz*, no such danger was present. We think *Coy* controls this case because just as the unauthorized persons in possession of election records posed a threat to the federal contest in *Coy*, the facts that Flowers and the workers helped voters vote and had possession of unsealed ballots posed a threat to the federal contest in this case.

concert with another to achieve an illegal goal. *United States v. Laughman,* 618 F.2d 1067, 1074 (4th Cir.), *cert. denied,* 447 U.S. 925 (1980). Further, once the existence of the conspiracy has been proved, the only additional proof necessary is the defendant's knowledge of the conspiracy and direct or indirect evidence of some action indicating his participation. *Id.; United States v. Harris,* 409 F.2d 77, 83 (4th Cir. 1969).

The evidence of the supper meetings at Carmichael's lakehouse at which the vote-buying plans were made clearly is sufficient evidence of the existence of a conspiracy. Further, it is clear Carmichael knew of the scheme. His parttime employee managed the vote-buying plan from Carmichael's office with Carmichael's tacit approval. And when he asked Flowers how many ballots had been received on May 10, and was told about fifty, he said "(t)hat's good."

The evidence that Carmichael participated in the conspiracy and aided and abetted in the scheme is less direct. It is clear, however, that he personally recruited two workers and told them it was okay to pay voters. In addition, the jury could infer Carmichael's participation from his authorization of Flowers to coordinate the absentee ballot system from Carmichael's office. Carmichael's sponsorship of the meetings when the scheme was planned also supports the inference of participation. Finally, the fact that Carmichael told Luther Nance not to tell the FBI about any money supports the inference that Carmichael knew of and participated in the conspiracy.

C.

Carmichael and Flowers both contend that the trial court erred in denying their motion for severence of the obstruction of justice charges pursuant to Fed.R.Crim.P. 8(b) and 14. Rule 8(b) authorizes joinder if the defendants "are alleged to have participated in the same act

or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 14 provides that "if it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information, the court may order an election or separate trials of counts, (or) grant a severance . . . ."

Carmichael and Flowers assert that because the separate obstruction of justice counts were entirely separate and distinct offenses from the conspiracy counts and from each other, joinder was improper as a matter of law under Rule 8(b), citng *Cupo v. United States*, 359 F.2d 990 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1013 (1967). In *Cupo*, the D.C. Circuit held that joinder of substantive charges of acquiring automobiles by false statements with charges of conspiracy to obtain other merchandise on credit from stores by false statements was impermissible without a showing of prejudice to the defendants under Rule 14 because such offenses were not part of the same act or transaction or series of acts or transactions.

The government argues that under Fourth Circuit precedent the obstruction of justice charges and the conspiracy charges were part of the same series of acts or transactions. We agree. Generally, "transaction" is a flexible term implying a connection of logical relationship rather than immediateness. *United States v. Cataneo*, 167 F.2d 820 (4th Cir. 1948). In this case the obstruction of justice charges related to actions by Carmichael and Flowers to conceal the actions for which they were charged under conspiracy and substantive counts. Similar concealment activities have been held to be properly joined under Rule 8 by this circuit in *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979), and by other circuits. *See, e.g., United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974).

Carmichael and Flowers also argue that even if joinder was permissible under Rule 8, the judge in his discretion should have granted severance under Rule 14 because joinder resulted in prejudice to them. They reason that they were prejudiced because the jury might have improperly cumulated all the evidence to infer a criminal disposition or to find guilt on all offenses when they may have been acquitted in separate trials solely on evidence of the separate offenses. *See United States v. Jamar*, 651 F.2d 1103, 1106 (4th Cir. 1977).

As the government points out, however, evidence of the conspiracy and actual vote buying would have been admissible against each defendant in separate trials for obstruction of justice to prove motive. Likewise, evidence supporting the obstruction of justice count against each defendant would be admissible against each defendant in a separate trial on conspiracy and the substantive counts to show criminal intent. *See United States v. Seidel*, 620 F.2d 1062, 1066 (4th Cir. 1980). Carmichael and Flowers vigorously contend, however, that if they had been tried separately on the obstruction of justice counts, evidence supporting the obstruction charge against Carmichael would not have been admissible against Flowers and vice versa. Nevertheless, prejudice does not result automatically from a situation where some evidence not admissible in separate trials is admitted in a joint trial. We agree with the Sixth Circuit that

> absent any unusual circumstances the matter of severance rests in the sound discretion of the trial judge, particularly where there is a charge of conspiracy as well as other counts of an indictment alleging substantive violations.

United States v. Branan, 457 F.2d 1062, 1066 (6th Cir. 1972).

Although every bit of evidence that was admissible in the defendants' joint trial might not be admissible

against each of them in separate trials of the obstruction charges, we perceive no particular danger that the jury would cumulate such evidence against either Flowers or Carmichael. We, therefore, find no abuse of discretion on the part of the trial court on this issue.

D.

Carmichael and Flowers also contest the admissibility of tally sheets reflecting the total number of absentee votes cast in Dillon County on grounds that it was irrelevant or, if relevant, its prejudicial effect outweighed its probative value under Fed. R. Evid. 403.[12] Apellants reason that the tally sheet is irrelevant because it showed the total number of absentee votes cast throughout the county, while the vote-buying charges referred to illegal activities in Lakeview precinct only. The tally sheets showed that 1,265 absentee votes were cast for Sheriff Lee county-wide, while only 81 were cast for his opponent. The Lakeview precinct book showed that almost 400 persons, or two out of every five voters in that precinct, received absentee ballots. The numbers on the tally sheet put the number of absentee ballots issued in Lakeview precinct in perspective. The tally sheet, while not relevant to the substantive counts, was relevant, therefore, to show the success of the conspiracy in Lakeview precinct. Under these circumstances it was not an abuse of discretion for the trial court to find that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

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[12]Fed. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the ideas, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

E.

Finally, Carmichael and Flowers argue that their indictments should be dismissed and their convictions reversed because of improper selection of the grand jury under the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, and the Plan of the United States District Court for the District of South Carolina for the Random Selection of Grand and Petit Jurors.[13]

Appellants first argue that because the pool from which the grand jury issuing their indictments was drawn contained slightly less than 300 names as required by South Carolina's Random Selection Plan, the Jury Selection and Service Act was violated and the indictments must be dismissed.[14] Although the Act requires courts to follow their jury selection plans, it contains no minimum pool size requirement. The district court below recognized that there had been a technical violation of the Plan. The Act, however, requires a substantial violation of its provisions before an indictment may be dismissed. 28 U.S.C. § 1867(d) (Cum. Supp. 1982); *United States v. Bearden*, 659 F.2d 590 (5th Cir. 1981). The two objectives furthered by the Act are "random selection of juror names from voter lists" and "determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only." H.R. Rep. No. 1076, 90th Cong., 2d Sess., *reprinted in* (1968) U.S. Code Cong. & Ad. News 1792, 1793. We agree with the district court that the technical violation of the Plan does not affect the objectives of the Act and, therefore, does not amount to a substantial

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[13]In their motion in the district court, the appellants incorporated the evidence and exhibits supporting a similar motion that was denied by Judge Falcon B. Hawkins in *United States v. Manbeck, et al.*, 514 F. Supp. 141 (D.S.C. 1981).

[14]The jury wheel contained 299 names for first drawing and 267 names for second drawing from which the grand jury was selected.

violation of the Act. *See United States v. Manbeck, et al.*, 514 F. Supp. 141, 144 (D.S.C. 1981).

Appellants' second contention is that four factors present in the selection of the grand jury resulted in an unrepresentative cross section of the community being present in the jury pool. The factors alleged are: 1) the sole use of voter registration lists as the starting point for the jury pool; 2) the racially discriminatory effect of South Carolina's disinfranchisement statute; 3) the high rate of women excused from jury duty; and 4) the low return rate of juror questionnaires. The record contains little evidence to support these allegations. As recognized in *United States v. Blair*, 493 F. Supp. 398, 407 (D.C. Md. 1980), 28 U.S.C. § 1863(b)(2) specifically requires that voter registration lists be used as the primary source for names of prospective jurors. Appellants apparently argue that the South Carolina Disinfranchisement Statute, *S.C. Code Ann.* § 7-5-120 (1976), has a racially discriminatory effect on the South Carolina voter registration lists and, therefore, taints any grand jury drawn from a pool using the lists. This court, however, has recently upheld the constitutionality of that statute in the face of an attack on equal protection grounds. *See Allen v. Ellisor*, 664 F.2d 391 (4th Cir.), *vacated and remanded*, 102 S.Ct. 80 (1981), *dismissed as moot and remanded on other grounds*, No. 79-1539 (February 16, 1982)(unpublished).[15]

Appellants' third contention concerning the rate of excuses for women is equally without merit. Under the South Carolina Plan, women with children under twelve years of age are excused from service on the grand jury upon request. According to the appellants' figures, the jury pool from which the grand jury in this case was

[15] *Allen* was dismissed on the merits for mootness because section 7-5-120(b) was amended in 1981 to disinfranchise only those persons convicted of felonies or the election laws. *See S.C. Code Ann.* §7-5-120(b) (Cum. Supp. 1981).

drawn was composed of 48% women while the community contained 52% women. The contention that the 4% difference constitutes substantial underrepresentation of that group of women is simply frivolous.

Finally, appellants argue that the Plan requires a 95% return rate of grand jury questionnaires and because the return rate for this grand jury was less - approximately 70% average - the fair cross section requirement of the Act was not met. A low return rate of questionnaires without some evidence that such rate caused underrepresentation of some group, does not amount to a substantial violation of the Act. Without other evidence, unfair cross section simply cannot be inferred. *See United States v. Armsberry*, 408 F.Supp. 1130, 1142 (D.C. Or. 1976).

III.

We find appellants' contentions on appeal to be without merit and, therefore, their convictions are

AFFIRMED

Appendix B
Order of United States Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5141

UNITED STATES OF AMERICA,
Appellee,

versus

ALBERT EUGENE CARMICHAEL, JR.,
Appellant.

No. 81-5142

UNITED STATES OF AMERICA,
Appellee,

versus

JOE GRADY FLOWERS,
Appellant.

ORDER

Upon consideration of the appellants' petition for rehearing, by counsel

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Ervin for a panel consisting of Judge Phillips, Judge Ervin, and Judge Doumar (U.S.D.J.).

For the Court,

CLERK

Filed: September 16, 1982

Supreme Court, U.S.
FILED
JAN 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-817

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT EUGENE CARMICHAEL, JR. AND
JOE GRADY FLOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence that petitioners bought votes to be cast in a combined federal and state primary election is sufficient to prove a violation of 42 U.S.C. 1973i(c).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at [illegible]95 F.2d 903.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. A petition for rehearing was denied on September 16, 1982. The petition for a writ of certiorari was filed on November 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 1973i(c) provides in pertinent part:

Whoever knowingly or willfully * * * pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000

or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy to pay for votes in an election held in part to select candidates for federal offices, in violation of 18 U.S.C. 371; 12 counts of paying for votes, in violation of 42 U.S.C. 1973i(c); and one count of obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner Carmichael was sentenced to concurrent terms of five years' imprisonment on the conspiracy and vote buying counts and a consecutive term of five years' imprisonment on the obstruction of justice count. Additionally, he was fined $20,000. Petitioner Flowers was sentenced to concurrent terms of four years' imprisonment on the conspiracy and vote buying counts and a consecutive term of three years' imprisonment for obstruction of justice. The court of appeals affirmed (Pet. App. 1a-17a).

1. The evidence as reflected in the opinion of the court of appeals showed as follows: Petitioner Carmichael was a state senator in South Carolina, representing Dillon, Marlboro, Chesterfield, and Lee Counties, and petitioner Flowers was one of his part-time employees (Pet. App. 2a). During the 1980 primary campaign, Sheriff Roy Lee of Dillon County asked Flowers to work for him in his reelection campaign. Carmichael gave his permission and also contributed financially to Lee's campaign (*id.* at 4a).

In April 1980, Carmichael was placed in charge of absentee balloting in the Lakeview precinct, and he delegated the responsibility to distribute absentee ballot applications to Flowers. They made the absentee ballot applications available at Carmichael's office (Pet. App. 5a).

In April and May 1980, three campaign meetings to re-elect Sheriff Roy Lee were held at petitioner Carmichael's lakehouse. Flowers attended all three meetings and Carmichael attended two (Pet. App. 5a-6a). Large numbers of campaign workers attended these meetings. At the close of the first meeting, petitioner Carmichael told Lee that they needed about 1,700 absentee ballots to win. At the second and third meetings, the campaign workers were told that they would be paid $10 per absentee ballot turned in and that they could pay the voters whatever they wished. Absentee ballot applications were distributed at the meetings, and it was suggested that the voters use vacation or employment outside the county as the reason for applying for the absentee ballot (Pet. App. 6a).

Lee campaign workers distributed absentee ballot applications to voters, had them filled out, and returned them to petitioner Flowers. When the absentee ballots had been received by the voters, the workers returned to help the voters fill out the ballot and then turned the ballots in to petitioner Flowers. When the ballots were turned back in, some of them were sealed as required by state law; however, many were unsealed (Pet. App. 6a).

The June 10, 1980, primary election was held in part to select candidates for the United States Senate and United States House of Representatives. The election results showed that 400 persons in the Lakeview precinct had voted by absentee ballot, which amounted to forty percent of the votes cast in that precinct. Sheriff Lee received the vote in 94% (1,265) of all absentee ballots cast in Dillon County (Pet. App. 7a-8a).

After the government presented its case-in-chief, petitioners moved for judgment of acquittal because "the government has failed to prove that anyone was paid to vote in a federal election," as opposed to an election which only included "a federal race" (C.A. App. 1035).[1] The motion was denied. After the close of the evidence, the United States proposed and the district court instructed, over petitioners' objection (*id.* at 1507), that the government was required to prove "that the election of June 10, 1980, involved in part the selection of candidates for United States Senate or United States House of Representatives" (*id.* at 1670).

2. The court of appeals affirmed (Pet. App. 1a-17a). The court rejected petitioners' argument that 42 U.S.C. 1973i(c) requires proof that the vote buying actually affected an election for federal office. Relying on its earlier decision in a case arising out of the same vote-buying scheme (*United States* v. *Mason*, 673 F.2d 737 (4th Cir. 1982)), the court held that a violation of Section 1973i(c) is established when the evidence shows that a defendant bought or offered to buy a vote and that the activity " 'exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption' " (Pet. App. 9a). The court found that since the absentee ballots were unsealed and petitioner Flowers helped mark the ballots, there was sufficient potential for corruption of the federal contests on the ballots to violate Section 1973i(c) (Pet. App. 9a-10a).

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[1] "C.A. App." refers to the joint appendix filed with the court of appeals.

ARGUMENT

1. Petitioners contend (Pet. 5-13) that 42 U.S.C. 1973i(c) requires proof that the vote buying had a direct and intended effect on a federal contest, and that since their conduct was directed solely at a local sheriff's race, it did not constitute a violation of federal law. In support of this contention, petitioners argue that Congress' power to regulate elections does not extend to a case such as this where the vote fraud is designed to influence the local contest and that, even if it did, Congress did not intend to proscribe efforts to corrupt local contests in mixed federal-state elections. Neither claim warrants review by this Court.

a. Under Article I, Section 4 of the Constitution, Congress has the power to regulate the manner in which federal elections are conducted, and this power extends to the prevention of fraud and corruption in carrying out those elections. See *Ex parte Yarbrough*, 110 U.S. 651 (1884). "[T]he power * * * of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned." *In re Coy*, 127 U.S. 731, 752 (1888). In *Coy*, the defendant made the identical challenge with respect to a mixed state and federal election that is presently being asserted by petitioners. There it was argued that since the evil intent was not shown to have been specifically aimed votes for federal office, Congress had no power to provide for any punishment. In rejecting the defendant's claim, this Court stated (*id.* at 754):

> The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members

> of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result.

Thus, it is established that Congress has the power to punish conduct that taints the integrity of a federal election, regardless of whether the defendants' immediate concern may be a local contest.[2]

b. Nor is there anything in 42 U.S.C. 1973i(c) that indicates Congress intended to limit prosecutions to cases involving a specific attempt to affect a federal contest. The plain language of the statute proscribes all vote buying in any mixed federal-state election. It does not require that the payment be made on behalf of a federal candidate or that the voter be paid to vote for a federal candidate. *United States* v. *Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States* v. *Bowman*, 636 F.2d 1003, 1008 (5th Cir. 1981).

Section 1973i(c) is violated when the proscribed conduct " 'exposes the federal aspects of the election to the possibility of corruption * * *.' " *United States* v. *Mason, supra,*

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[2]Contrary to petitioners' contention, *Blitz* v. *United States*, 153 U.S. 308 (1894), does not require a different result. In *Blitz*, the Court reaffirmed its holding in *Coy* and distinguished it on the basis that one of the two counts on which the defendant was convicted charged only a state offense, because that count did not sufficiently allege any federal nexus required by the particular vote fraud statute at issue in that case. In upholding the conviction on the other count, which alleged an impact on the federal election, the Court made clear that its decision turned on the wording of the offense charged in the indictment.

673 F.2d at 739-740, quoting *United States* v. *Bowman, supra*, 636 F.2d at 1011. The payment for votes is the evil at which the statute is aimed, and it is a practice that inherently corrupts the entire election. 111 Cong. Rec. 16245-16246 (1965) (remarks of Rep. Cramer); *id.* at 16250 (remarks of Rep. Rhodes). It is impossible to isolate a threat to the integrity of the state electoral process from a threat to the integrity of the federal contest in a mixed election. 111 Cong. Rec. 8432 (1965) (remarks of Sen. Williams); *United States* v. *Bowman, supra*, 636 F.2d at 1012.[3] The district court thus instructed the jury properly regarding the jurisdictional element of 42 U.S.C. 1973i(c).[4]

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[3]It is inconceivable that Congress would have imposed on the government the onerous burden of proving actual effect on a federal contest. Cf. *McElroy* v. *United States*, No. 80-6680 (Mar. 23, 1982), slip op. 12-13. As Senator Williams explained in proposing the amendment that served as the basis for 42 U.S.C. 1973i(c), "[i]f national and State officers are listed on the same ballot how could I as a layman prove what vote a man might have been paid $10 for?" 111 Cong. Rec. 8432 (1965).

When called to testify, voters whose ballots have been the subject of fraudulent practices rarely are able to reconstruct the circumstances under which their votes were stolen or purchased from them in sufficient detail to allow them to testify as to the identity of the candidates for whom their votes were cast. Indeed, as the record in this case amply demonstrates, it is common with this type of fraud for a voter never to have seen his ballot. Accordingly, the fraud is likely to have a corrupting effect on federal elections even if that is not its purpose, but the precise effect will be difficult to reconstruct.

[4]This Court's decision in *Anderson* v. *United States*, 417 U.S. 211 (1974), does not cast any doubt on the validity of petitioners' convictions under Section 1973i(c). That case involved the proper interpretation of 18 U.S.C. 241, as applied to an alleged conspiracy to cast fraudulent votes for federal offices. The Court's decision that the evidence in that case was sufficient to establish a violation of Section 241 provides no support for petitioners' contentions here. Indeed, there,

2. Petitioners argue (Pet. 12-13) that the court of appeals, by relying on evidence that ballots were delivered unsealed and that workers marked ballots, affirmed on the basis of a theory not presented to the jury. Although the court of appeals did advert to this evidence, which was irrelevant under the district court's charge to the jury, it is by no means clear from the opinion that it held that such evidence was essential to proof of the offense. Rather, it appears to have been referred to in order to illustrate the corruptive potential inherent in the context of mixed federal-state elections.

In any event, any error in this regard does not warrant review by this Court. There is simply no reason for this Court to take up the issue of the proper interpretation of Section 1973i(c), since there is no conflict in decisions among the courts of appeals regarding its scope, or to review petitioners' convictions, since their conduct clearly violated the statute under any theory of its coverage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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as here, the primary purpose of the conspirators was to affect a local election (see 417 U.S. at 215) and the scheme inevitably would involve the casting of fraudulent votes for federal as well as state and local offices in order to prevent the fraud from being needlessly conspicuous.

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